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85-1553

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether an instruction at the penalty phase of a death penalty trial not to be swayed by mere sympathy, passion, prejudice, public opinion, or public feeling violates the Eighth Amendment where the defendant has been permitted an unlimited opportunity to present mitigating evidence and the instruction merely advised the trier of fact not to consider matters not relevant to the offense or the offender.

2. Whether the Eighth Amendment requires that a trier of fact be given discretion not to impose the death penalty because it believes the penalty is inappropriate even though it has found aggravating factors outweigh mitigating factors when state law mandates the trier

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of fact shall return a punishment of death when it determines the aggravating factors outweigh the mitigating factors.

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Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California affirming the conviction and special circumstance, but

reversing the penalty of death, entered on December 5, 1985. A petition for rehearing was denied on January 30, 1986, and the opinion was ordered modified. The remittitur was issued on January 30, 1986.

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the penalty of death (People v. Brown (1985) 40 Cal.3d 488) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing and modifying the opinion appears as Appendix B of this petition.

JURISDICTION

The judgment of the California Supreme Court was filed on December 5, 1985. A timely petition for rehearing

was denied on January 30, 1986. This petition is filed within 60 days of that date and therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendments Eight and Fourteen.

STATEMENT OF THE CASE

By an amended information filed on October 15, 1981, the District Attorney of Riverside County charged respondent in count I with murder, in violation of Penal Code section 187. It was further alleged the murder was committed while respondent was engaged in the commission of the crime of rape within the meaning of Penal Code section 190.2, subdivision (a)(17)(iii). Respondent was also charged in count II with rape, in violation of

Penal Code section 261, subdivisions 2 and 3. It was further alleged he inflicted great bodily injury within the meaning of Penal Code section 12022.8. Additionally, it was alleged he suffered two prior felony convictions. (CT 1-3.)[1/] Respondent pled not guilty and denied the special allegations. (CT 25, 82.)

Trial by jury commenced (CT 105) and on February 4, 1982, the jury found appellant guilty of first-degree murder and forcible rape as charged in the information. (CT 194-195.) The jury specifically found the murder was done with express malice aforethought, premeditation and deliberation. (CT 196.)

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1. The designation "CT" refers to the Clerks Transcript. The designation "RT" refers to the Reporter's Transcript.

The great bodily injury allegation was found to be true. (CT 197.) The jury further found a special circumstances allegation (Pen. Code, § 190.2, subd. (a)(17) (iii) to be true. (CT 158.) On February 19, 1982, the jury fixed the penalty on count I as death. (CT 314.) The court imposed the death penalty on count I. As to count II, respondent was sentenced to state prison for the upper term of eight years with a five-year enhancement for a great bodily injury allegation plus a five-year enhancement for the first prior, the term on count II to run consecutively to count I but stayed pending appeal on count I. (CT 324, 335-337.)

On an automatic appeal to the California Supreme Court, the judgment of

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guilt and a finding of a special circumstance was affirmed. The penalty judgment was reversed.

STATEMENT OF FACTS

A. Guilt Phase

On October 28, 1980, at approximately 7:30 a.m., 15 year-old Susan Jordan and her minor sister (Karen) and brother (James) left their house located at 9946 Victoria Avenue in Riverside. (16 RT 4079-4082, 4090.)

Angelina Jordan, Susan's mother, called home from work at about 3 p.m. that day to check on Susan and the other children. Karen answered the telephone and told Mrs. Jordan that Susan had not come home. (16 RT 4094-4095.) Mrs. Jordan drove to the Arlington High School and looked for Susan.[2/] She could

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2. It was later determined Susan did not attend school that day. (21 RT 5211.)

not locate her so she drove home. Susan was not at home. (16 RT 4097-4100.) Mrs. Jordan became concerned and began checking around the neighborhood for Susan. (16 RT 4100-4104.)

Mrs. Jordan returned home and at about 7 p.m. the telephone rang. Mrs. Jordan answered it and a male voice said, "Hello, Mrs. Jordan. Susie isn't home from school yet, is she?" Mrs. Jordan replied, "No, she isn't." The male voice then said, "You will never see your daughter again. You can find her body on the corner of Victoria and Gibson." She asked the caller to repeat it and he did. She pleaded with him not to hang up, but he did. (16 RT 4105-4106.) Mrs. Jordan subsequently called police. (16 RT 4107.)

At 7:31 p.m. a telephone call was received at the Riverside Police

Department. A male caller said, "On the corner of Gibson and Victoria, fifth row, you will find a white Caucasian body of a young girl in the orange grove." Thereafter, the caller hung up. (19 RT 4650-4653.)

Police officers were sent to the orange grove. A search of the orange grove commenced but did not turn up anything. (19 RT 4608, 4657-4659, 4660.) Mrs. Jordan later informed a police officer of the anonymous phone call she had received earlier that evening. Shortly thereafter the telephone rang and the officer answered it. (19 RT 4612.) A male voice said, "Is this the Jordan house or the Jordan residence?" He replied, "Yes." The male caller then said, "You can find Sue's identification in a telephone booth at the Texaco station at Arlington and Indiana." (19 RT

4613.) The caller then hung up. (19 RT 4614.)

Officer Taulli later arrived at the orange grove and a dog named Nikky sniffed Susan's clothing. Nikky began to search the grove. (19 RT 4662.) Shortly thereafter, Nikky led police to a pair of torn panties inside the grove. Nikky then went down to the next six rows where Susan's body was found. Susan's body was face down and dirt was piled up on each side of her head. Police secured the area (19 RT 4665-4669) and homicide detectives were called to the scene. (19 RT 4663-4664, 4673-4674, 4689.) Susan's body was nude except for a pair of socks, a blouse, and a bra partially pulled out from under the blouse. Six footprints of what appeared to be tennis shoes were located near the body and photographed. (19 RT 4678-4682.)

Meanwhile, Chaplain Morgan had obtained a tape recorder and a telephone recording device and connected it to the Jordans' telephone. (18 RT 4457-4458.) At about 8:40 p.m. the phone range and he answered it. A male voice said, "In the tenth row you'll find the body." (18 RT 4458-4459.)

Police officers were sent that night to a telephone booth located at the Texaco station at the intersection of Arlington and Indiana. (19 RT 4623.) A search of the booth revealed two Arlington High School identification cards belonging to Susan Jordan and an envelope or library pouch from some type of school book. (19 RT 4626, 4634, 4786-4787; 20 RT 4861-4863.) Stamped across the envelope were the words "Arlington High School." (20 RT 4863.)

In the early morning of October 29, 1980, police officers set up road

blocks on the streets surrounding the area of the orange grove. Police stopped passerbys and questioned them regarding the killing of Susan. (19 RT 4726-4727.) As a result of the roadblock, police obtained information from several individuals. Among them was Wylie Eng, a student at Arlington High School. (17 RT 4119-4120, 4159.) Eng indicated he normally saw Susan walking to school and that he usually passed her on his bicycle. On the morning of October 28, 1980, he left home for school at about 7:30 a.m. While en route to school, he saw Susan walking toward Van Buren Boulevard and then onto the bike trail toward Gibson Street near the orange grove. She was carrying her books. (17 RT 4123-4131.) As Eng approached Gibson Street, he saw a black man wearing green shorts and a green and white baseball

shirt approaching the bike trail from Gibson Street. (17 RT 4132-4133.) Near the intersection of Gibson and Victoria Streets Eng saw a copper colored Trans-Am, new model, parked on Gibson Street. (17 RT 4136-4137.)

Eng subsequently was shown a photo lineup and he picked out respondent's photo as the black man he saw on the morning of October 28, 1980, near the orange grove. (17 RT 4177; 21 RT 5225.)

Julie Pim, another Arlington High School student, was also interviewed by police. On the morning of October 28, 1980, at about 7:30 a.m. she and her brother left for school. As they drove by the intersection of Victoria Street and Van Buren Boulevard, she saw Susan cross the intersection and continue walking toward Gibson Street. Susan was carrying her books up against her chest.

(17 RT 4179-4186.) She saw a black man standing on the curb near the intersection of Victoria Street and Van Buren Boulevard. He wore green shorts and a white and green top. (17 RT 4187.) Pim picked out respondent's photo from a police photo lineup. (17 RT 4227, 4239, 4241; 21 RT 5223-5224.) She identified respondent at the preliminary hearing and at trial as the black man she saw that morning near the orange grove. (17 RT 4188, 4232, 4242.)

Lonnie Boozell drove his daughter to school on the morning of October 28, 1980. He saw Susan walking near Van Buren Boulevard and Gibson Street. She was carrying her books. Approximately 70 feet from Susan he saw a black man behind a tall tree between Van Buren Boulevard and Gibson Street. The black man had

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jogging clothes on and appeared to be jogging in place. (17 RT 4245-4253.)

Henry Garcia and Joseph Yancey carpooled to work on the morning of October 28, 1980. While driving on Victoria Street near Van Buren Boulevard, they saw Susan walking. Approximately 15 feet behind her they saw a black man wearing jogging clothes (i.e., shorts). (17 RT 4278-4291, 4319-4327.) At trial Garcia identified respondent as being similar to the black man he saw walking behind Susan that morning. (17 RT 4292.)

Marsha Johnson informed police she had driven by the area on the morning of October 28, 1980. She saw a newer model dark brown Trans-Am parked on Gibson Street. The license plate was a dealer paper plate which had "Made in America" written on it. (18 RT 4337-4345.)

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Raymond Rogers was also in the area of Gibson and Victoria Streets at about 7:40 a.m. on October 28, 1980. He saw a "Pontiac or Camaro" parked on "Gibson with a license plate that read "Made in USA" or "Made in America." (18 RT 4364-4371, 4384-4389.)

Michael Cornell, another Arlington High School student, also saw a Trans-Am parked on Gibson Street on the morning of October 28, 1980. The license plates read "Made in America." (18 RT 4397-4414.) At trial he identified respondent's vehicle as being similar to the car he saw that morning. (18 RT 4414.)

Peter Rodriguez saw a brown Trans-Am parked on Gibson Street on the morning of October 28, 1980. It had an unusual license plate which read "USA" or "America" on it. (18 RT 4468-4472.) He

saw a black man come out of the area of the orange grove and walk around to the driver's side of the Trans-Am. The black man thereafter opened the trunk area of the vehicle. The individual kept staring at Rodriguez. (18 RT 4476-4477.) At trial Rodriguez identified respondent's vehicle as being similar to the Trans-Am he saw that day and testified respondent looked similar to the black man he saw but he was not certain. (18 RT 4475, 4480 4481.)

Margery Johnston, a county employee, rode her bicycle to work on the morning of October 28, 1980. As she rode on the bike path adjacent to the orange grove on Gibson and Victoria Streets, she saw a black man wearing jogging clothes come out of the orange grove. He appeared startled and his legs were dirty and dusty. (23 RT 5600-5608.) She also

saw a brown sports car parked near the area. (23 RT 5610-5611.) At trial Mrs. Johnston positively identified respondent as the black man she saw that day. (23 RT 56095612.)

On the basis of the information obtained by police from the various witnesses police initiated a surveillance of respondent and his residence on Gertrude Street. (20 RT 4843.) On November 6, 1980, police saw respondent drive up to his residence in a brown Trans-Am. (19 RT 4805-4806.) Subsequently, respondent drove from his residence and was eventually stopped and arrested by police. (19 RT 4807.)

A search warrant for respondent's residence on Gertrude Street was obtained. (20 RT 4847, 4875.) A search of the garage area revealed a paper license plate behind a water heater. The license

plate read "Made in America."[3/] (20 RT 4848, 4877; 22 RT 5446.) A search of the interior of the residence revealed a Pacific Telephone directory with a page folded back where the listing for the Jordan residence was located. (20 RT 4886-4887.) Police found and seized a book entitled "ALM Spanish Book" with Susan Jordan's signature inside the cover. (20 RT 4889-4890; 23 RT 5640.) Police also located underneath a bed two newspaper articles relating to Susan's death. (20 RT 4881-4885.)

Shortly after completing the search of respondent's house, police went to respondent's place of employment, armed with a search warrant for his locker. (20 RT 4850.) Police searched his locker

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3. Respondent had the plate on his Trans-Am in October of 1980. (18 RT 4505, 4518; 22 RT 5445-5446.)

and seized a pair of running shorts, a pair of green jogging shorts, a white and green jersey, boxer shorts, a pair of socks, a brown shirt, and some rags. (20 RT 4852-4856.)

Subsequent to the search of respondent's residence, police learned that Susan had checked out a book entitled "The Citadel." (21 RT 5228, 5242.) Police obtained another search warrant for appellant's residence. Police seized "The Citadel" from appellant's residence. (20 RT 4891-4892.)

(20 RT 4998-5001; 21 RT 5242.)

An autopsy of Susan's body revealed bruises on the nose, back area, right arm, neck, and head. The nature of the bruises suggested she was alive at the time she suffered these injuries. (22 RT 5365-5391.)

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At trial William Anderson and Norm Gibson, who were acquainted with respondent, identified the voice of the caller to the Jordan residence on October 28, 1980, and tape recorded by Chaplain Morgan, as being that of respondent. (22 RT 5449, 5453.)

B. Defense

Respondent's defense at the guilt phase was one of alibi. (23 RT 5775-5780.)

HOW THE FEDERAL QUESTION IS PRESENTED

At the penalty phase the jury was instructed in the words of CALJIC No. 8.84 that it must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. The prosecutor made a similar argument during voir dire and at the close of the penalty phase.

Respondent Brown contended on appeal to the California Supreme Court that the admonishment not to consider sympathy was error which invalidates the penalty judgment.

The Supreme Court agreed noting that because of individualized sentencing concerns inherent in the Eighth Amendment, federal constitutional law forbids an instruction which denies a capital defendant the right to have a jury consider any sympathy factors raised by the evidence when determining the appropriate penalty.

In addition, the California death penalty law as set forth in Penal Code section 190.3 and as instructed to the jury in CALJIC No. 8.84.2 provides the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances and

shall impose a sentence of death if it concludes that the aggravating circumstances outweigh the mitigating circumstances. Respondent Brown argued that by use of the term "outweigh" and the mandatory "shall" the statute impermissibly confined the jury to a mechanical balancing of aggravating and mitigating factors and constituted a mandatory death penalty that did not allow the trier of fact to consider the offense and the offender.

The California Supreme Court rejected the constitutional attack on 190.3, but noted the statute was valid because the trier of fact was free upon completion of the weighing process to determine whether the death penalty was appropriate.

The court then noted in a footnote to the opinion that prior death

penalty judgments could be open to question if the record reflected the trier of fact was confused as to its role in making the penalty determination. The court also indicated that trial courts in the future should instruct the jury as to the scope of its discretion and responsibility in accord with the principles set forth in the opinion.

Petitioner's timely petition for rehearing urged that the California Supreme Court decision was erroneous. Petitioner argued CALJIC No. 8.84 did not preclude the jury from considering any evidence which might be mitigating. Instead, the jury was instructed to consider all the evidence.

Petitioner also argued CALJIC No. 8.84.2 was a correct interpretation of 190.3 without additional instructions and the trier of fact could be told it

shall impose the death penalty if the aggravating factors outweigh the mitigating factors.

The petition for rehearing was denied, but the opinion was modified to add a footnote which approved of a jury instruction which allowed the jury to not impose the death penalty if it deemed the punishment to be inappropriate even if it concluded the aggravating factors outweighed the mitigating factors.

REASON FOR GRANTING THE WRIT

The decision of the California Supreme Court that CALJIC No. 8.84 violates the federal Constitution is erroneous as the instruction advising the jury not be swayed by mere sympathy focuses the jury on the offense and the offender rather than extraneous matters. Thus, the giving of this instruction results in jury verdicts that are based on the

offense and the offender, and reduces the likelihood that verdicts will be arbitrary and capricious and contrary to the dictates of Furman v. Georgia (1972) 408 U.S. 238. Certiorari should thus be granted as the California Supreme Court's decision conflicts in principle with Furman, and other decisions of this Court.

Moreover, the decision of the California Supreme Court which, in essence, reads California Penal Code section 190.3 to permit a trier of fact to not impose a death penalty if it finds the penalty inappropriate even if the aggravating factors outweigh the mitigating factors, also puts about 170 prior death penalty judgments into question as these cases did not contain instructions permitting such discretion. In addition, the special instructions approved by the opinion place

an unnecessary burden on the prosecution as it not only must establish that aggravating factors outweigh mitigating factors, but it must also establish that the penalty is appropriate when this is not required by the federal Constitution. In addition, giving a trier of fact discretion to determine whether a penalty is appropriate could result in verdicts that are arbitrary and capricious.

Thus, certiorari should be granted as the opinion of the California Supreme Court on this issue unnecessarily places prior death penalty judgments into question and places an unnecessary burden on the prosecution in future cases although the law as written prior to Brown fully comported with the federal Constitution and is similar to the death penalty law approved by this Court in Jurek v. Texas (1976) 428 U.S. 262.

ARGUMENT

I

IT DOES NOT VIOLATE THE UNITED STATES CONSTITUTION TO INSTRUCT A PENALTY JURY NOT TO BE SWAYED BY MERE SYMPATHY

At the penalty phase of the trial the jury was instructed with CALJIC No. 8.84 which advised the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The prosecutor made similar arguments, both during the voir dire of jurors and at the close of the penalty case. (People v. Brown (1985) 40 Cal.3d 512, 537.)

Respondent Brown contended these admonishments not to consider sympathy were error which would invalidate the penalty phase. The California Supreme Court agreed noting that:

> "Because of the individualized sentencing concerns inherent

in the Eighth Amendment, 'federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any "sympathy factor" raised by the evidence when determining the appropriate penalty . . . .' Hence it is error to give an anti-sympathy instruction at the penalty phase of a capital trial." (People v. Brown, supra, 40 Cal.3d at p. 537.)

The California Supreme Court also concluded its prior cases required rejection of the State's argument that such an instructional error, if any, was vitiated by the provision of CALJIC No. 8.84.1 which allows the jury to consider "any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Emphasis in original.)

Instead, the court concluded this instruction when combined with CALJIC No. 8.84 was calculated to divert

the jury from its constitutional duty to consider any sympathetic aspect of the defendant's character. (People v. Brown, supra, 40 Cal.3d at p. 537.) The court concluded this result violated prior opinions of this Court in Eddings v. Oklahoma (1982) 455 U.S. 104, 113-115; Lockett v. Ohio (1978) 438 U.S. 586, 604; and Woodson v. North Carolina (1976) 428 U.S. 280, 304. (People v. Brown, supra, at p. 537.) The court found the error in giving CALJIC No. 8.84 to be prejudicial and reversed the penalty phase.

The holding in Brown is based on a misunderstanding by the California Supreme Court of the prior decisions of this Court. As a result the Supreme Court has read too much into the prior decisions of this Court and has placed an undue burden on prosecutors of the State of California and courts charged with

trying capital cases. For these reasons, it is respectfully requested this Court grant certiorari.

The incorrectness in the decision of the California Supreme Court in People v. Brown, supra, and its forerunners (People v. Lanphear (1984) 36 Cal.3d 163, 166, and People v. Easley (1983) 34 Cal.3d 858, 876), becomes clear when the prior decisions of this Court are examined.

In Furman v. Georgia (1972) 408 U.S. 238, this Court held the death penalty could not be imposed under sentencing procedures that created a substantial risk the death penalty would be imposed in an arbitrary and capricious manner. Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be

suitably directed and limited so as to minimize the rise of wholly arbitrary and capricious action. (Gregg v. Georgia (1976) 428 U.S. 153, 188-189.)

In Gregg v. Georgia, supra, at p. 195, this Court observed that,

> "In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, at p. 195.)

In response to the concerns of Furman expressed by this Court, some states took all discretion away from the jury and enacted statutes which required the

jury impose the death penalty if it concluded the defendant had committed a certain crime. (Woodson v. North Carolina (1976) 428 U.S. 280.) This Court concluded such laws do not fulfill Furman's basic requirement of replacing arbitrary and wanton jury discretion with objective standards to guide, regulate, and make rationally reviewable the process of imposing a death sentence. (Id., at p. 303.) Moreover, such laws do not permit particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition of the death sentence. (Id. at p. 303.)

Since Woodson, this Court has repeatedly noted the touchstone of a valid death penalty law is that it permit the trier of fact that is to determine death be able to consider the facts

surrounding the offense and the offender. (Lockett v. Ohio, supra, 438 U.S. at p. 604; Eddings v. Oklahoma, supra, 455 U.S. at pp. 113-115.)

Indeed, in Lockett and Eddings this Court observed that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death. (Lockett v. Ohio, supra, at p. 604.)

Thus, in essence, this Court has concluded in Furman a trier of fact is not to be given unlimited or arbitrary discretion in determining whether to impose the death penalty. In addition, after Lockett and Eddings the trier of

fact may be permitted to consider the penalty only after consideration of any aspects of the defendant's character or record or any circumstance of the offense the defendant proffers as a basis for a sentence less than death.

The California Supreme Court in this case concluded that admonishing the jury not to be swayed by mere sympathy in argument, voir dire, or CALJIC No. 8.84, violates Lockett and Eddings as it precludes the jury from considering mitigating evidence relating to the offender. However, this holding misreads Furman, Lockett, and other decisions of this Court.

CALJIC No. 8.84 simply tells the jury not to be swayed by mere sentiment, sympathy, conjecture, passion, prejudice, public opinion or public feeling. This means the trier of fact

is not to decide the case based upon unfettered or untethered emotions unrelated to the facts and circumstances of the offense or the offender. Rather, the trier of fact is to determine the punishment based upon an analysis of the facts and circumstances of the case as related to the offense and the offender.

Such an instruction is consistent with Furman v. Georgia, supra, as it tells the jury not to arbitrarily decide the punishment based on factors unrelated to the facts and circumstances of the case or the offender, and based solely on emotion. Indeed, the instruction advises the jury to avoid the very problem addressed in Furman: unfettered and arbitrary decision making by the trier of fact unrelated to the facts of the case or the character and record of the defendant.

Such an instruction also is consistent with the decision of this Court in Roberts v. Louisiana (1976) 428 U.S. 325. In Roberts, a post-Furman case, a plurality of this Court struck down a Louisiana death penalty law that required the death penalty be imposed if the trier of fact convicted the defendant of first degree murder, but permitted the jury, without any standards or evidence of lesser included offenses, to find the existence of the lesser included offenses of second degree murder or voluntary manslaughter as a means of showing mercy. This Court concluded this procedure resulted in standardless and arbitrary and capricious decision making by the trier of fact contrary to the dictates of Furman.

Roberts makes it clear that while a trier of fact is to consider as

mitigating evidence any aspect of the defendant's character or circumstances relating to the offense, the trier of fact does not have unlimited discretion to render a verdict based on sympathy or emotion unrelated to the facts of the case.

Indeed, Lockett v. Ohio, supra, 438 U.S. at p. 604, fn. 12, makes it clear the trier of fact is only to consider evidence bearing on the offense and the offender that is relevant to the facts of the case and the offender. "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or circumstances of the offense."

The giving of CALJIC No. 8.84 did not violate the federal constitution. It precluded the jury from being swayed by mere emotion unrelated to the fact of

the case or the offender which could result in arbitrary and capricious decision making. Instead, it limited the jury to a consideration of the facts and circumstances of the case relevant to the offense and the offender as mandated by Roberts and Lockett.

Moreover, the jury was instructed in this case with CALJIC No. 8.84.1 which allowed the jury to consider various factors relating the offense and the offender. Subsection (k) of this provision indicates the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC No. 8.84.1 thus allowed the jury to consider all relevant evidence relating to the offense and offender as mandated by this Court in

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Lockett and Eddings, while CALJIC No. 8.84 cautioned the jury to not be swayed by mere emotion and thereby precluded the jury from making an arbitrary and capricious decision as condemned by this Court in Furman and Roberts. Thus, CALJIC No. 8.84 was properly given here and is consistent with the holdings of this Court. Moreover, admonitions to the jury not to be swayed by mere sympathy or emotion were also proper.

However, the California Supreme Court has suggested CALJIC No. 8.84.1, subdivision (k) might not comport with federal constitutional standards as it does not permit the trier of fact to consider mitigating evidence relating to the offender, but only the offense.

However, the language of subsection (k) clearly indicates it deals with any circumstance mitigating the offense

including those involving the offender. Moreover, to adopt the approach of the California Supreme Court would mean that CALJIC No. 8.84.1 probably violates Lockett v. Ohio, supra, 438 U.S. 586. However, CALJIC No. 8.84.1 as given essentially is a restatement of Penal Code section 190.3 and this Court has concluded 190.3 is consistent with Lockett. Thus, CALJIC No. 8.84.1 as given measures up to the standards in Lockett and deals with the offense and offender as well.

As this Court noted in California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19:

> "We note further that respondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of

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> Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops.3d 26 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case. Cal. Penal Code Ann. § 190.3 (West Supp. 1983)."

Thus, any argument regarding defects in CALJIC No. 8.84.1 is meritless here. In addition, nothing in the instruction precludes the jury from considering any mitigating factor that might not be mentioned by the statute or the instruction.

In addition, this Court again upheld 190.3 and the entire California death penalty law in Pulley v. Harris (Jan. 23, 1984) ___ U.S. ___ (79 L.Ed.2d 29), noting that:

> "By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small sub-class of capital-eligible

cases The statutory list of relevant factors, applied to defendants within this sub-class, 'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty.' Harris v. Pulley, 692 F.2d, at 1194, 'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate,' id., at 1195. The jury's 'discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Gregg, 428 US, at 189, 49 L Ed 2d 859, 96 S Ct 2909. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review cannot be successfully challenged under Furman and our subsequent cases." (Pulley v. Harris, supra, 79 L.Ed.2d at p. 29; emphasis added.)

Thus, under the instructional scheme of this case, CALJIC No. 8.84.1 allowed the jury to consider all relevant mitigating evidence relating to the offense and the offender. CALJIC No. 8.84 on the other hand precluded the jury

from rendering a verdict of death based on untethered emotions or sentiment. Thus, it and similar admonitions were properly given in this case as a means of precluding the jury from rendering an arbitrary and capricious finding.

Consequently, the California Supreme Court erroneously concluded the trial court improperly instructed the jury with CALJIC No. 8.84. The instruction instead was consistent with the dictates of the Eighth and Fourteenth Amendments and the decisions of this Court. Indeed, it was used to preclude the very problems raised by this Court in Furman. Thus, it is requested that certiorari be granted on this issue. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than

caprice and emotion." (Gardner v. Florida (1977) 430 U.S. 349, 358.)

In People v. Brown, supra, 40 Cal.3d at p. 538, fn. 7, the California Supreme Court also concluded the portion of CALJIC No. 8.84 which advised the jury to render a just verdict regardless of the consequences would be understood by the jury in the same light as an instruction to disregard sympathy and thus indicated this part of CALJIC No. 8.84 should not be given.

However, as noted with regard to the other provision of this instruction, it does not violate the federal Constitution to advise the jury to render a just verdict regardless of the consequences. The instruction tells the jury not to consider unrelated facts, emotions, or consequences, but to simply weigh the facts relating to the offense

and the offender. This is consistent with Lockett and Eddings and comports with the mandate of Furman that the jury not have untrammeled discretion.

Thus, the California Supreme Court also erroneously concluded this provision of CALJIC No. 8.84 violated the United States Constitution.

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II

THE EIGHTH AMENDMENT DOES NOT REQUIRE A JURY BE GIVEN DISCRETION NOT TO IMPOSE THE DEATH PENALTY ONCE IT HAS CONCLUDED AGGRAVATING FACTORS OUTWIEGH MITIGATING FACTORS

In People v. Brown, supra, 40 Cal.3d 513, the California Supreme Court also upheld the provision of the California death penalty law in Penal Code section 190.3 which describes how the jury shall weigh and consider the aggravating and mitigating factors. However, the court once again misread the mandate of prior decisons of this Court while upholding the statute and thereby put into question about 170 prior death penalty judgments in California. (See Lucas, J., concurring dissenting, People v. Brown, supra, 40 Cal.3d at pp. 546-548.) The opinion also fostered a jury instruction which allows a jury in

future cases to avoid imposing the death penalty even if it concludes the aggravating factors outweigh the mitigating factors as required by Penal Code section 190.3 if the jury feels the penalty would not be appropriate. This instruction places an undue burden on the prosecution which must not only prove the aggravating factors outweigh the mitigating factors, but must also convince the jury the penalty is appropriate. Consequently, it is requested certiorari be granted in this case.

The various factors the trier of fact is to consider in deciding to impose the death penalty are set forth in Penal Code section 190.3, supra.

Penal Code section 190.3 then explains how the trier of fact is to analyze these factors:

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> "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (Pen. Code § 190.3; emphasis added.)

Respondent Brown attacked the latter provision of Penal Code section 190.3 on two grounds. First, he noted that section 190.3(k) directed the jury to consider as a mitigating factor any circumstance which extenuates the gravity of the crime even though not a legal excuse to the crime, but it did not expressly state the jury's further

constitutional duty to consider in mitigation all other sympathetic evidence a defendant may offer about his character and background, even if it is unconnected to the charged crimes.

Brown also argued by use of the term "outweigh" and the mandatory "shall" the statute impermissibly confined the jury to a mechanical balancing of aggravating and mitigating factors. Brown also argued that because the statute required a death judgment if the former outweighed the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty. (People v. Brown, supra, 40 Cal.3d at p. 539.)

In answering Brown's first challenge to the law, the court neglected

to note, as petitioner has previously noted here, that this Court has concluded the provision of Penal Code section 190.3 subdivisions (a) through (k) comport with the federal Constitution and the Lockett decision. (California v. Ramos, supra, 463 U.S. 992; Pulley v. Harris, supra, 79 L.Ed.2d 29.)

In addition, however, the court noted that Penal Code section 190.3 subdivision (k) had been interpreted by that Court previously in such a way that it would comport with what the California Supreme Court believed the Lockett decision required. (Thus, Penal Code section 190.3 subdivision (k) prospectively was to read that the jury could consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse

for the crime and any other aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (People v. Brown, supra, 40 Cal.3d at p. 541.)

The California Supreme Court also noted the weighing provisions of section 190.3 also did not violate the United States Constitution.

> "Similarly, the reference to 'weighing' and the use of the word 'shall' in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors

> he is permitted to consider, including factor 'k' as we have interpreted it. By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case." (People v. Brown, supra, 40 Cal.3d at p. 542; footnotes omitted.)

The Supreme Court went on to conclude that the 1978 death penalty law interpreted this way is not invalid on the ground that it withdraws constitutionally compelled sentencing discretion from the jury. (Id., at p. 545.) After reaching this conclusion, the court, in a footnote amplified its holding by noting the instruction that the jury "shall"

impose a sentence of death could be confusing. Consequently, the jury should be instructed as to the scope of its discretion and responsibility as stated in the opinion.

> "We acknowlege that the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role. Indeed, such confusion is occasionally reflected in records before this court. For that reason, trial courts in future death penalty trials--in addition to the instruction called for by Easley, supra, 34 Cal.3d at page 878, footnote 10--should instruct the jury as to the scope of its discretion and responsibility in accordance with the principles set forth in this opinion. We pass no judgment here upon the validity of death penalty verdicts previously rendered without benefit of the Easley instruction or the instruction we now require. Each such prior case must be examined on its own merits to determine whether, in context, the sentencer may have

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> been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." (People v. Brown, supra, 40 Cal.3d at p. 545, fn 17.)

The footnote also left open to question prior death judgments that did not have an instruction as noted in footnote 17.

The court thereafter denied a request of the State of California for a rehearing. For guidance, however, the court noted a proposed instruction adopted by a California committee on criminal jury instructions (CALJIC) conformed with the reasoning expressed in footnote 17. The instruction reads as follows:

> "'The weighing of aggravating and mitigating circumstances does not mean a mere mechanical weighing of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them.

> You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence [circumstances] is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" (People v. Brown, supra, 40 Cal.3d at p. 545, fn. 17; emphasis added.)

The essential problem is that while the court upheld Penal Code section 190.3, it read the prior decisions of this Court too broadly to preclude a trier of fact from being required to impose the death penalty where the aggravating factors outweighed the mitigating factors. Instead, the court held that the federal Constitution requires that

section 190.3 be construed so as to permit the sentencing jury the discretion to determine whether the sentence of death is appropriate irrespective of the weight of aggravating amd mitigating factors.

This holding is inconsistent with the decision of this Court in Jurek v. Texas (1976) 428 U.S. 262. In Jurek this Court upheld the Texas statute which permitted the consideration of mitigating evidence, but required the imposition of a death sentence if the jury answered "yes" to specified questions. If such a mandatory death penalty law will pass constitutional muster, there is no reason why the California law which permits the jury to take into account and be guided by the aggravating and mitigating factor and to impose the death penalty if the agravating factors outweigh the mitigating factors should not also be valid.

A close reading of Jurek v. Texas indicates that a law such as California's which mandates the imposition of the death penalty if the trier of fact determines aggravating factors outweigh mitigating factors does not violate the Constitution for two specific reasons.

First, by requiring the trier of fact find aggravating circumstances after finding a defendant guilty of first degree murder, the law limits the category of murderers who can face the death penalty. Moreover, it requires the trier of fact to focus on the particularized nature of the crime. Jurek places great emphasis on this fact. (See Jurek v. Texas, supra, 428 U.S. at pp. 270-271.) In addition, as in Jurek, the California law permits the trier of fact to consider any relevant mitigating evidence before

making the penalty determination. According to Jurek, this factor too is important. (See Jurek v. Texas, supra, 428 U.S. at pp. 271-272.)

According to Jurek, if a state law narrows the class of murderers who can receive the death penalty by having the trier of fact consider aggravating circumstances and that same state law requires the trier of fact consider mitigating circumstances, then a law which mandates imposition of the death penalty if the trier of fact reaches a certain conclusion (in Jurek an answer to a specific question and in California the fact that aggravating factors outweigh mitigating factors) passes constitutional muster.

Thus, the California death penalty law as stated in Penal Code section 190.3 without the judicial gloss

placed on it in Brown passes constitutional muster. Indeed, this Court specifically upheld the California law in toto in Pulley v. Harris, supra, 79 L.Ed. 2d at p. 42.)

In addition, this Court has upheld the Florida death penalty law which requires a sentence of death be imposed if the aggravating factors outweigh the mitigating factors. (See Proffit v. Florida (1976) 428 U.S. 242.) If Florida's law, which is similar to California's law, is valid under the federal Constitution, the California Supreme Court certainly had no basis for interpreting the California law to give the jury discretion to determine of the death penalty was appropriate even after it had concluded the aggravating factors outweighed the mitigating factors.

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In addition, the language of Brown is susceptible to causing mischief of federal constitutional dimensions. Brown suggests the trier of fact should have some leeway in determining whether the death penalty is appropriate even after weighing the aggravating and mitigating factors and concluding the aggravating factors outweigh the mitigating factors.

However, this could result in decisions to impose the death penalty which are not specifically guided, but are arbitrary and capricious. (See Barclay v. Florida (1983) 463 U.S. 939.) This Court has condemned death penalty verdicts that are achieved by such means. ". . . [D]iscretion must be suitably directed and limited so as to minimize

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the risk of wholly arbitrarily and capricious action. Gregg v. Georgia, 428 U.S. 153, 189 (1976). . . ." (Zant v. Stephens (1983) 462 U.S. 862, 874.)

In addition, the construction placed on the death penalty law by the California Supreme Court places the prosecution at a disadvantage. For even if the prosecution establishes that aggravating factors outweigh mitigating factors as required by the statute for imposition of the death penalty, the trier of fact may still decide on its own that such a penalty is inappropriate and impose the punishment of life without possibility of parole. However, the United States Constitution does not require the jury be given so much leeway. Instead, the Constitution only requires the trier of fact be given the opportunity to consider aggravating and miti-

gating factors before being given a mandate to impose or not impose the death penalty. Thus, the interpretation of Penal Code section 190.3 by the Supreme Court of California while upholding the law places the State of California at an unfair advantage. Not only must it prove to the trier of fact that aggravating factors outweigh mitigating factors to procure the death penalty, but it must also convince the jury that the punishment is appropriate.

Thus, Brown unnecessarily penalizes the prosecution of future death penalty cases and places an unnecessary burden on the prosecution. Moreover, the Brown decision, particularly footnote 17, casts serious doubt on the validity of about 170 prior death penalty judgments in light of the constitutional interpretation of Penal Code section 190.3 by the

Brown court. Thus, although the court technically upheld section 190.3, it placed in jeopardy prior death penalty judgments in California and imposed an unnecessary burden on the prosecution. Moreover, Brown leaves open the possibility that in a given case a trier of fact could arbitrarily and capriciously determine a penalty contrary to the dictates of prior decisions of this Court. For these fundamental reasons, it is requested certiorari be granted to overturn the ruling of the California Supreme Court on this issue.

* * * * *

CONCLUSION

Therefore petitioner respectfully requests this Court grant certiorari.

Respectfully submitted,

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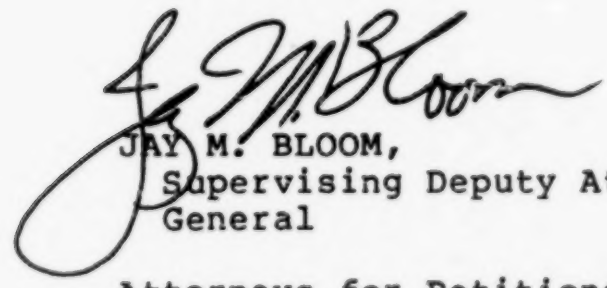

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October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

ALBERT GREENWOOD BROWN,

Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage pre-paid deposited in the United States mail by me at San Diego, California, on the 20 day of March, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 20, 1986.

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me this 20th day of March, 1986.

Vida M. Allen
Notary Public in and for said County and State